

Oct 20, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL ROBINS,

Plaintiff,

v.

CITY OF EAST WENATCHEE d/b/a  
East Wenatchee Police Department,

Defendant.

No. 2:19-cv-00299-SMJ

**ORDER DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendant City of East Wenatchee, doing business as East Wenatchee Police Department ("the Department")'s Motion for Summary Judgment, ECF No. 17. Plaintiff Michael Robins sued the Department, alleging it denied him a promotion from police officer to detective because of his age. For the reasons below, the Court finds that a genuine dispute of material fact as to pretext precludes summary judgment and denies the motion.

**BACKGROUND**

Robins has worked as a police officer with the East Wenatchee Police Department ("the Department") since February 2006. ECF No. 1-1 at 3. In November 2017, Robins, 58 years old at the time, applied for a position in the

1 Detective Division. Three other Officers applied for the job: Officer James B.  
2 Johnson (42 years old), Officer Joseph Hinkle (58 years old), and Officer Miguel  
3 Valdez (33 years old). ECF No. 45-17 at 2. Chief John R. Harrison, Assistant Chief  
4 Ray Coble, and Detective Darin Darnell (“the Interview Committee”) evaluated the  
5 candidates. *See* ECF No. 45-17 at 2. Although all three were involved in the  
6 decision-making process, Chief Harrison made the final determination. *See* ECF  
7 No. 45-17 at 2–3. The Department selected Officer Johnson<sup>1</sup> for the Detective  
8 position. *See* ECF No. 45-17 at 2.

## 9 LEGAL STANDARD

### 10 A. Summary Judgment

11 The Court must grant summary judgment if “the movant shows that there is  
12 no genuine dispute as to any material fact and the movant is entitled to judgment as  
13 a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it “might affect the  
14 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477  
15 U.S. 242, 248 (1986). A dispute about a material fact is “genuine” if “the evidence  
16 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

17 In ruling on a summary judgment motion, the Court must view the evidence  
18 in the light most favorable to the nonmoving party. *See Tolan v. Cotton*, 572

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20 <sup>1</sup> For clarity, this Order will refer to him as Officer Johnson throughout, despite his  
intervening promotion.

1 U.S. 650, 657 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157  
2 (1970)). Thus, the Court must accept the nonmoving party’s evidence as true and  
3 draw all reasonable inferences in its favor. *See Anderson*, 477 U.S. at 255. The  
4 Court may not assess witness credibility or weigh the evidence. *See id.* Yet the  
5 nonmoving party may not rest on the mere allegations or denials of its pleading but  
6 must instead set forth specific facts, and point to substantial probative evidence,  
7 tending to support its case and showing a genuine issue requires resolution by the  
8 finder of fact. *See Anderson*, 477 U.S. at 248–49.

9 **B. Age Discrimination**

10 The ADEA makes it unlawful for an employer to discriminate “because of  
11 [an] individual’s age.” 29 U.S.C. § 623(a)(1). The prohibition is “limited to  
12 individuals who are at least 40 years of age.” 29 U.S.C. § 631(a). To prevail on a  
13 claim for age discrimination under the ADEA, a plaintiff must prove at trial that age  
14 was the “but-for” cause of the employer’s adverse action. *Gross v. FBL Fin.*  
15 *Servs.*, 129 S. Ct. 2343, 2350 (2009). “Unlike Title VII, the ADEA’s text does not  
16 provide that a plaintiff may establish discrimination by showing that age was simply  
17 a motivating factor.” *Id.* at 2349.

18 Courts apply the *McDonnell Douglas* test at the summary judgment stage of  
19 a suit brought under the ADEA when a plaintiff seeks to establish discrimination  
20 through indirect evidence. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th

1 Cir.2002). First, plaintiff must establish a prima facie case of age discrimination.  
2 Once plaintiff makes a prima facie case, the *McDonnell Douglas* test shifts  
3 the burden of production to the defendant. *Shelley v. Geren*, 666 F.3d 599, 607–08  
4 (9th Cir. 2012). If defendant offers a legitimate, nondiscriminatory reason for the  
5 adverse employment action, plaintiff must then raise a triable issue of material fact  
6 as to whether the defendant’s proffered reasons for their terminations are mere  
7 pretext for unlawful discrimination. *Id.* at 608. The Court should not act as part of  
8 the hiring committee. The employer need not have chosen the *best* candidate for the  
9 position. They just cannot have made the decision based on age discrimination.

#### 10 **1. The Prima Facie Case**

11 A “prima facie case requires evidence adequate to create an inference that an  
12 employment decision was based on an illegal discriminatory criterion.” *O’Connor*  
13 *v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (internal quotation marks and  
14 alterations omitted).

15 In a failure-to-promote case, a plaintiff may establish a prima facie case of  
16 discrimination in violation of the ADEA by producing evidence that they were (1)  
17 at least forty years old, (2) qualified for the position for which they applied, (3)  
18 denied the position, and (4) the promotion was given to a substantially younger  
19 person. *Shelley*, 666 F.3d at 608; *See also O’Connor*, 517 U.S. at 313 (“Because the  
20 ADEA prohibits discrimination on the basis of age and not class membership, the

1 fact that a replacement is substantially younger than the plaintiff is a far more  
2 reliable indicator of age discrimination than is the fact that the plaintiff was replaced  
3 by someone outside the protected class.”).

## 4           **2.     Legitimate, Nondiscriminatory Reason**

5           The burden of production then shifts to the defendant to provide a  
6 nondiscriminatory explanation for its hiring decisions. *Coleman v. Quaker Oats*  
7 *Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000), *cert. denied sub nom.* 533 U.S. 950  
8 (2001). The burden of production is quite low, defendant need only to produce a  
9 facially valid explanation for the adverse employment decision. *See Diaz v. Eagle*  
10 *Produce Ltd. Partnership*, 521 F.3d 1201 (9th Cir. 2008).

## 11           **3.     Pretext**

12           Once defendant articulates a legitimate nondiscriminatory reason for the  
13 adverse employment decision, the burden shifts back to plaintiff to raise a genuine  
14 factual question on whether the proffered reason is pretextual. *Shelley*, 666 F.3d at  
15 609. The plaintiff can prove pretext “(1) indirectly, by showing that the employer's  
16 proffered explanation is ‘unworthy of credence’ because it is internally inconsistent  
17 or otherwise not believable, or (2) directly, by showing that unlawful discrimination  
18 more likely motivated the employer.” *Chuang v. Univ. of Cal. Davis, Bd. Of*  
19 *Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). “At this point in the analysis, the  
20 presumption of unlawful discrimination simply drops out of the picture.”

1 *Coleman*, 232 F.3d at 1282 (internal quotations and citations omitted). The Court  
2 must consider all the evidence—whether direct or indirect—cumulatively. *Id.*

### 3 **DISCUSSION**

#### 4 **A. Robins has established a prima facie case of age discrimination**

5 At 58-years old, the ADEA protects Robins. The parties agree that he was  
6 qualified for the Detective position and that the Department denied him the position.  
7 Officer Johnson, who the Department chose for the position, is sixteen years  
8 younger—substantially younger—than Robins. *See O'Connor*, 517 U.S. at 312.  
9 Robins has thus established a prima facie case of age discrimination.

#### 10 **B. The Department has offered a legitimate, nondiscriminatory reason for** 11 **the adverse employment action**

12 The Department has offered several legitimate, nondiscriminatory reasons  
13 for not choosing Robins for the Detective position. The Department points to the  
14 2016 performance evaluations of Robins and Officer Johnson, which show Officer  
15 Johnson scoring higher. In 2016, Robins scored a two out of five on the “Attitude”  
16 category of his performance evaluation. The comments noted that he “often speaks  
17 negatively about his coworkers,” creating a “negative work atmosphere.” ECF No.  
18 18-1 at 16. For similar reasons, he also received a score of two on the “Cooperation  
19 with Supervisor/Management” and “Cooperation with Peers” categories. Robins  
20 did not score above a three in any category in 2016. ECF No. 45-12 at 2–3.

1 The Department also asserts evidence that Robins was openly and  
2 unproductively critical of fellow officers and Department policy, rising to the level  
3 of insubordination at times. *See* ECF No. 45-17 at 3. The Department also asserts  
4 that Robins refused to mentor younger officers. ECF No. 18-1 at 20. Robins's  
5 superiors have expressed that Robins has a poor work ethic, he often asked others  
6 to do his work, he had never executed or served a search warrant, and he lacked  
7 attention to detail. ECF No. 45-17 at 3.<sup>2</sup>

8 These are facially legitimate explanations for deciding not to choose Robins  
9 for the Detective position.

10 **C. Robins has established a genuine issue of material fact as to pretext**

11 **1. Evidence that the Proffered Reasons Were Not the True Reasons**  
12 **for the Hiring Decision**

13 Robins argues that the Department's proffered reasons are a pretext. He  
14 argues that of the four candidates for the Detective position, he had worked for the  
15 Department for the longest time. The Department hired Robins on February 3, 2006  
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18 <sup>2</sup> Defendant also cites Robins's grievance filed with the City (related to the hiring  
19 decision at issue here) as evidence of his lack of attention to detail because it  
20 contains several misspelled words. ECF No. 18-1 at 7. Although this report was  
drafted the hiring decision and so the Interview Committee could not have used it  
as a basis for the decision, it does tend to support the assertion that Robins lacks  
attention to detail.

1 and Officer Johnson on May 3, 2007.<sup>3</sup> ECF No. 18-1 at 3. Both Robins and Officer  
2 Johnson, then, had worked at the Department for over a decade when the position  
3 opened. But Robins also had the most experience, having worked as a police officer  
4 since 1995.<sup>4</sup> Robins submitted seven training certificates to support his application,  
5 while Officer Johnson submitted five, and Officers Hinkle and Valdez submitted  
6 none. ECF No. 45-8; ECF No. 45-9; ECF No. 45-10 at 3–7; ECF No. 45-11 at 4–7.  
7 While Robins was on “light duty” while recovering from an injury, he had worked  
8 with the detective division, albeit in a limited capacity. ECF No. 45-3 at 34–35.  
9 Detective Darnell does not remember any complaints about Robins’s work in the  
10 detective division. ECF No. 45-4 at 33. Supervisors even tasked Robins with  
11 training Officer Valdez—two of the Interview Committee’s first choice for the  
12 Detective position—when the Department first hired Officer Valdez in 2017. ECF  
13 No. 45-5 at 9.

14 Robins also takes issue with the characterization of his work performance by  
15 the Interview Committee and points out that many of his purported shortcomings  
16 are shared by Officer Johnson, who received the Detective position. After receiving

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18 <sup>3</sup> The Department hired Officer Valdez on April 5, 2017 and Officer Hinkle on April  
19 1, 2008. ECF No. 18-1 at 3.

20 <sup>4</sup> The Pacific County Sheriff’s Office hired Robins as a full-time Deputy in February  
1995. Before that, according to his resume, he had worked as a Provisional Deputy  
with Douglas County since August 1993 and a Reserve Deputy with Wenatchee  
Police Department from April 1989 to July 1992 and Douglas County Sheriff’s  
Office from July 1992 to February 1995. ECF No. 45-11 at 2.



1 negative comments on his 2016 Performance Evaluation, Robins wrote a response,  
2 attached to the evaluation, stating that the negative remarks arose from his  
3 “willing[ness] to speak up about the concerns [he] ha[s] that co-workers may be  
4 involved in illegal actions or violating citizens’ rights” rather than a bad attitude.  
5 ECF No. 45-12 at 5. His response argues that he has positive relationships with most  
6 of his coworkers. ECF No. 45-12 at 6. The response did not sway his supervisor,  
7 and an addendum notes that his evaluation would stay the same, despite Robins’s  
8 dissent. ECF No. 45-12 at 7. But even Officer Johnson stated that “Mike Robins is  
9 a pillar in the department . . . Mike is very proactive . . . He doesn’t slough off calls  
10 . . . Based on my many years knowing Mike, he is not lazy or sloppy.”<sup>5</sup> ECF No.  
11 45-7 at 2. Yet Assistant Chief Coble also stated that Officer Johnson struggled at  
12 times with report writing. ECF No. 45-3 at 24. He has had to return reports to  
13 Officer Johnson because they contain run-on sentences, no delineation of  
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15 <sup>5</sup> Robins also presents evidence from 2017 performance review stating that Robins  
16 “has a vast knowledge and skill set to perform the job” and is “a team player.” ECF  
17 No. 45-13 at 3. The supervisor states that he sent Robins to more complex calls  
18 because he “knew that [Robins] would get it done thoroughly and correctly.” ECF  
19 No. 45-13 at 3. This evaluation, although completed after the hiring process at issue,  
20 remarks upon the period immediately preceding the hiring, which took place in  
November 2017. In his 2018 evaluation, Robins’s supervisor even stated that  
Robins “handles the lions share [sic] of our difficult investigations and sensitive  
type calls” and “completes these reports with minimal errors or input and turns them  
in completed and on time at a far greater rate than his team mates.” ECF No. 45-14  
at 2. Although this evaluation took place after the hiring at issue, a jury might  
consider it persuasive in discerning Robins’s earlier performance.

1 paragraphs, and other grammar issues that affected understandability. *Id.* Detective  
2 Darnell has said that Officer Johnson struggles with his knowledge base. ECF No.  
3 45-4 at 24. *See Shelley*, 666 F.3d at 610–612 (finding a genuine issue of fact where  
4 the chosen candidate displayed some of the same shortcomings as the plaintiff and  
5 plaintiff had more experience than the chosen candidate).

6 Robins also argues the Department manufactured the proffered reasons in  
7 response to the claims of discrimination. He presents evidence that the Interview  
8 Committee did not consider the 2016 performance evaluations. *See* ECF No. 45-2  
9 at 27, 30–31 (Chief Harrison has no independent recollection of reviewing the 2016  
10 performance evaluations side-by-side before choosing Officer Johnson).<sup>6</sup> In fact,  
11 Robins presents evidence that Detective Darnell did not review any materials (i.e.,  
12 the candidates’ applications for the position and performance evaluations), or even  
13 conduct any interviews before deciding to recommend Officer Valdez, even though  
14 rarely observed Robins work. *See* ECF No. 45-2 at 10; ECF No. 45-4 at 12–13; ECF  
15 No. 45-4 at 16. Robins also presents evidence that Assistant Chief Coble did not  
16 review any of the applicants’ personnel files before making his recommendation to

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18 <sup>6</sup> Because Assistant Chief Coble and Chief Harrison sign the Performance  
19 Evaluations, they at least saw them when they were prepared. ECF No. 45-12 at 4.  
20 And Chief Harrison’s and Assistant’s Declarations state that they reviewed the  
Performance Evaluations during the selection process. ECF No. 18-1 at 5; ECF No.  
18-2 at 4. But the Interview Committee did not review the evaluations before  
making their recommendations and decisions, especially not side-by-side, so a jury  
should decide this issue.

1 Chief Harrison. *See* ECF No. 45-2 at 28; ECF No. 45-3 at 33. In turn, Chief Harrison  
2 had very little direct interaction with the candidates in their day-to-day work and  
3 had little knowledge of their performance. ECF No. 45-2 at 5 (Chief Harrison had  
4 limited firsthand interactions with officers); *see also* ECF No. 45-2 at 10 (Chief  
5 Harrison has no independent recollection of reviewing the personnel files before  
6 choosing Officer Johnson).

## 7           **2. Evidence that Age Was the True Reason for the Hiring Decision**

8           Robins argues that indirect evidence supports his assertion that the Interview  
9 Committee discriminated based on Robins's age. Robins points to the fact that after  
10 the application period for the Detective position had closed, Detective Darnell  
11 approached Officer Valdez (33 years old) to personally encourage him to apply.  
12 ECF No. 45-2 at 13; ECF No. 45-4 at 3. Despite his limited experience—the  
13 Department had hired him earlier that year—both Assistant Chief Coble and  
14 Detective Darnell chose him as their first choice for the position. *See* ECF No. 45-  
15 17 at 3. In fact, Officer Valdez (33 years old) and Officer Johnson (42 years old)  
16 were the top choices of all the members of the Interview Committee,<sup>7</sup> and Robins  
17 and Officer Hinkle (both 58 years old) were not finalists for any member of the  
18 committee.

19 \_\_\_\_\_  
20 <sup>7</sup> Officer Johnson Chief Harrison's first choice and Assistant Chief Coble and  
Detective Darnell's second choice. Chief Harrison did not express a second choice.  
*See* ECF No. 45-17 at 3.

1       The Interview Committee asked each candidate where he sees himself in five  
2 years. *See* ECF No. 45-16. Because of their age, both Robins and Officer Hinkle  
3 answered that they hoped to have retired. ECF No. 45-4 at 35; ECF No. 45-16 at 7–  
4 12, 19–24. Detective Darnell has stated that he felt that Officer Robins and Officer  
5 Hinkle were “nuts” for not having retired by 53 years old. ECF No. 45-4 at 11.  
6 Detective Darnell even says he “got a chuckle out of” Robins’s answer to this  
7 question. ECF No. 45-4 at 35.

8       Outside the hiring process at issue, Robins presents evidence of age bias.  
9 Both Officer Hinkle and Robins assert that Assistant Chief Coble treats older  
10 officers poorly. *See* ECF No. 45-5 at 7 (Assistant Chief Coble harassed Officer  
11 Leyde, an older officer); ECF No. 45-6 at 3 (Assistant Chief Coble favored younger  
12 officers, harassed older officers).<sup>8</sup>

### 13       **3. Cumulative Effect of the Evidence**

14       While the Department points to the 2016 performance evaluations as an  
15 objective difference between Robins and Officer Johnson that justified their  
16 decision, the evidence taken together, viewed in the light most favorable to Robins,  
17 the nonmoving party, creates a genuine issue of fact on pretext. “[S]ubjective  
18 [employment] practices are particularly susceptible to discriminatory abuse and  
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20 <sup>8</sup> Robins also argues that Detective Darnell shows signs of bias against older officers. Because Robins did not attach Interrogatory 3 as an Exhibit, the Court did not consider this argument.

1 should be closely scrutinized.” *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d  
2 1477, 1481 (9th Cir. 1987). Here, the Department had no policies or procedures for  
3 the selection process, endowing the Interview Committee with a great deal of  
4 discretion. ECF No. 45-2 at 17. The Interview Committee used no standards or  
5 rubric against which to compare the candidates. ECF No. 45-4 at 14–15.

6 Robins has presented evidence that the members of the Interview Committee  
7 had decided who to recommend before reviewing the application materials and  
8 conducting interviews. That, combined with the indirect evidence of age bias, could  
9 lead a reasonable jury to find that the Department’s proffered legitimate,  
10 nondiscriminatory reasons for the hiring decision are pretext. As a result, judgment  
11 as a matter of law in favor of Defendants is inappropriate.

## 12 CONCLUSION

13 Genuine disputes of material fact exist as to whether Robins has established  
14 pretext. His age discrimination claim, then, should be presented to a jury at trial.  
15 This Court denies the Department’s Motion for Summary Judgment.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 Defendant's Motion for Summary Judgment, **ECF No. 17**, is

3 **DENIED.**

4 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
5 provide copies to all counsel.

6 **DATED** this 20<sup>th</sup> day of September 2020.

7   
8 SALVADOR MENDEZ, JR.  
United States District Judge